IN THE HIGH COURT OF JUDICATURE, ANDHRA PRADESH
AT HYDERABAD

(Special Original Jurisdiction)

WEDNESDAY, THE NINTH DAY OF FEBRUARY
TWO THOUSAND AND FIVE

PRESENT

**THE HON'BLE MR JUSTICE K.C. BHANU**

**WRIT PETITION NO : 25227 of 2004**

Between:

M/s Sri Tirumala Highway Filling

Station (Terminated) Jaggaiahpeta , Krishna District,
Rep. by its Proprietor Bodeputi Venkata Rao S/o Late Sambaiah, aged 49 years, Dr.No. 30-19-12,
Chaparalavari Street, Seetharampuram,

Vijayawada - 520 002, Krishna District (A.P).

**..... PETITIONER**

AND

1. The Chairman and Managing Director,

Hindustan Petroleum Corporation Ltd,
Registered Office, 17,

Jamshedji Tata Road, Mumbai - 400 020.

2 The Senior Regional Manager-Retail, Hindustan Petroleum Corporation Ltd,
Vijayawada Retail Regional Office, Kattubadipalem,
Pinapaka Post, G. Koduru Mandalam,
Kondapalli - 521 228, Krishna District.

3 Shri G. Baskaran,
Hindustan Petroleum Corporation Ltd, South Zone,
Talamuthu Natarajan Building,
4th Floor, 8 Gandhi Irwin Road,

Egmore, Chennai- 600 008.

4 Union of India, Rep. by its Secretary,
Ministrhy of Petroleum & Natural Gas, 201,

'A' Wing, Sastry Bhawan,
New Delhi - 110 001.

**.....RESPONDENTS**

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court will be pleased to grant a Writ, Order or direction more particularly one in the nature of a writ of certiorari, calling for the records of Arbitration Proceedings from the 3rd Respondent, and quash the impugned award therein submitted in Material Document No.1, as illegal, arbitrary, without application of mind, substantively and procedurally ultra vires, without jurisdiction a nullity and nonest factum while directing parties for a de novo arbitration in accordance with the provisions of Section 11 of the Arbitration and Conciliation Act 1996 ( Central Act 21 of 1996) and to pass such further or other orders.

**Counsel for the Petitioner: SMT.SUVARNA JAYASRI**

**Counsel for the Respondents: MS.P.SARADA**

The Court, at the admission stage, made the following :

**THE HON'BLE MR JUSTICE K.C.BHANU**

**WRIT PETITION NO: 25227 of 2004**

**ORDER:**

The present writ petition is filed for issuance of writ of certiorari, calling for the records of the Arbitration Proceedings from the 3rd respondent and quash the impugned award dated 05-05-2003 as illegal and arbitrary.

2. With regard to the maintainability, this Court heard the learned counsel appearing for the petitioner and the learned standing counsel for the respondent Nos.1,2 and 4.

3. The brief facts that are necessary for the disposal of the present writ petition may be stated as follows:-

4. The 1st respondent had appointed the 3rd respondent as a sole arbitrator pursuant to the arbitration clause in the agreement dated 16-12-1993, which arbitration clause is governed by the provisions of the Indian Arbitration Act, 1940 which stood repealed on coming into force of the Arbitration and Conciliation Act (21 of 1996) (for brevity 'the Act, 1996'). Thus the arbitration clause in dealership agreement dated 16-12-1993 came to be governed by the provisions of the Act, 1996. Though, it is taken as a ground that the 1st respondent appointing the 3rd respondent is nothing but usurpation of the powers vested to the Honourable Chief Justice of Andhra Pradesh and therefore the appointment itself is illegal, but the said plea has not been raised and on that point no arguments have been advanced by the learned counsel for the petitioner.

5. The only contention raised in this writ petition is that the notice as

required under Section 12 of the Act, 1996 has not been issued, which is mandatory and therefore, the petitioner prays to set aside the impugned award dated

05-05-2003. Since no other contention has been advanced by the learned counsel appearing for the petitioner, it can be deemed that the other contentions raised in the writ petition have been given up.

6. On the other hand, the learned counsel appearing for the respondent Nos.1 and 2 contended that the petitioner himself submitted with regard to the jurisdiction of the arbitrator and hence, there is no need to give any notice as required under Section 12 of the Act, 1996 and that there is a separate procedure is enumerated in the Act, 1996 for setting aside the award and that remedy has not been availed by the petitioner. Hence, prays to dismiss the writ petition.

7. The petitioner herein filed W.P.No.9885 of 2002 challenging the proceedings issued by the 1st and 2nd respondents dated 24-05-2002 where under this Court disposed of the writ petition giving a liberty to the petitioner to approach the 1st respondent by making appropriate application within a period of two weeks from today, and if any such application is made, the 1st respondent shall consider the same in terms of the Dealership Agreement and initiate the arbitration proceedings and it is open to the petitioner to raise all the grounds. Thereafter the petitioner made an application dated 11-06-2002, praying *inter alia* to allow the arbitration application. There upon, the 3rd respondent was appointed as a sole arbitrator to adjudicate the disputes and differences in the matter of termination of dealership agreement dated 16-12-1993 by its proceedings No.CMD/100, dated 04-07-2002. Thereupon, the 1st respondent directed the petitioner and 2nd respondent to submit the claim statement together with supporting documents and reply of the statement of claim and counter claim and also re-joinder, if any. After appointing the sole arbitrator vide letter No.SZ/GB/ARB, dated 15-07-2002, directed the both parties to submit a statement of claim, reply, counter claim. The petitioner

received the acknowledgment and after filing of the claim statement, reply and re-joinder, the parties were given personal hearing. The petitioner was represented by the Advocate of Supreme Court and Tax Consultant in arbitration proceedings. After considering the written submissions and on hearing the representations of the petitioner and 2nd respondent, arbitration proceedings have been passed by the 3rd respondent. To set aside the award passed by the 3rd respondent, the present writ petition is filed.

8. Section 34 of the Act, 1996 provides application for setting aside arbitral award. In a decision reported in ***M.ANASUYA DEVI v. M.MANIK REDDY*** it is held that it is not in dispute that an application for setting aside an award would not allow on any other ground which is not enumerated in Section 34 of the Act, 1996.

9. The learned counsel for the petitioner relied upon a decision reported in ***UJJAM BAI v. STATE OF UTTAR PRADESH*** wherein it was observed as under:

> "When, under the provisions of a law, the State exercises judicial power as for instance, by entertaining an appeal or revision or assessing or levying a tax it acts as a quasi-judicial Tribunal and its decision even though erroneous will not be a nullity and cannot be ignored. It can be corrected only under Art. 226 or Art. 227 by the High Court or under Art. 136 by this Court inasmuch as the State would then be acting as a quasi-judicial Tribunal."

10. Based on the above decision, the learned counsel for the petitioner contended that since the notice as contemplated under Section 12 of the Act, 1996 has not been issued, the entire proceedings are vitiated. He also relied upon a decision reported in ***NARESH v. STATE OF MAHARASHTRA*** wherein, it was held as follows:

> "The scope of the jurisdiction of this Court in dealing with writ petitions under Art. 32 was examined by a Special Bench of this Court in Smt.Ujjam Bai v. State of Uttar Pradesh 1963-I SCR 778: (AIR 1962 SC 1621). The decision would show that it was common ground before the Court that in three classes of cases a question of the enforcement of the

fundamental rights may arise; and if it does arise, an application under Art. 32 will lie. There cases are: (1) where action is taken under a statute which is ultra vires the Constitution; (2) where the statute is intra vires but the action taken is without jurisdiction; and (3) where the action taken is procedurally ultra vires as where a quasi judicial authority under an obligation to act judicially passes an order in violation of the principles of natural justice."

11. The learned counsel for the petitioner also relied upon another decision reported in ***CHIEF JUSTICE, A.P. v. L.V.A.DIKSHITULU*** wherein, it was held that:

"As against the above, Shri Vepa Sarathy, appearing for the respective first respondents in C.A.2826 of 1977 and in C.A.278 of 1978 submitted that when his client filed a writ petition (No.58908 of 1976) under Article 226 of the Constitution in the High Court for impugning the order of his compulsory retirement passed by the Chief Justice, he had served, in accordance with Rule 5 of the Andhra Pradesh High Court (Original Side) Rules, notice on the Chief Justice and the Government Pleader, and, in consequence, at the preliminary hearing of the writ petition before the Division Bench, the Government Pleader appeared on behalf of all the respondents including the Chief Justice, and raised a preliminary objection that the writ petition was not maintainable in view of Cl.6 of the Andhra Pradesh Administrative Tribunal Order made by the President under Article 371-D which had taken away that jurisdiction of the High Court and vested the same in the Administrative Tribunal. This objection was accepted by the High Court, and as a result, the writ petition was dismissed in limine. In these circumstances – proceeds the argument – the appellant is now precluded on principles of res judicata and estoppel from taking up the position that the Tribunal's order is without jurisdiction. But, when Shri Sarathy's attention was invited to the fact that no notice was actually served on the Chief Justice and that the Government Pleader who had raised this objection, had not been instructed by the Chief Justice or the High Court to put in appearance on their behalf, the counsel did not pursue this contention further. Moreover, this is a pure question of law depending upon the interpretation of Article 371-D. If the argument holds good, it will make the decision of the Tribunal as having been given by an authority suffering from inherent lack of jurisdiction. Such a decision cannot be sustained merely by the doctrine of res judicata or estoppel as urged in this case."

12. In the above decision, the Apex Court held in the Head Note as follows:

> "Where the decision of a Tribunal is challenged on a pure question of law depending upon interpretation of a constitutional provision, which, if upheld, would make the decision of the Tribunal as having been given by an authority suffering from inherent lack of jurisdiction, the decision cannot be sustained by invoking doctrine either of *res judicata* or estoppel."

13. But in this case, the jurisdiction of the 3rd respondent has not been challenged. The jurisdiction to conduct arbitration proceedings is not under challenge. Therefore, the above decision has no application to the present facts of the case. Insofar as other decisions relied upon by the learned counsel for the petitioner are concerned, there is no dispute about the proposition of law laid down by Their Lord-ships. But the question involved in this writ petition is whether non-giving of notice as contemplated under Section 12 of the Act, 1996, is a ground for setting aside the arbitration award?

14. The learned counsel for the respondents 1 and 2 has relied upon a decision reported in ***BHARAT HEAVY ELECTRICALS LTD. v. THEIR WORKMEN*** wherein it was held to the following effect:-

> "Thus, Arbitration Act, 1940, is a self-contained exhaustive code. Relief sought by the appellant by invoking extraordinary jurisdiction of the High Court under Art. 226 could have been obtained by proceeding in accordance with the relevant provisions of the Arbitration Act. In this situation, if the High Court declined to entertain the writ petition, no exception can be taken to it."

15. Whereas the learned counsel for the petitioner submitted that since the decision is rendered under repealed Act, 1940, it cannot be made applicable to the present facts of the case.

16. There cannot be any dispute that if the arbitration Tribunal has not followed the mandatory procedure prescribed under the Act, it would mean that it has acted beyond its jurisdiction and thereby the award would be competently illegal which could be set aside under Section 34 of the Act, 1996.

17. Section 34 of the Act, 1996 provides the application for setting aside arbitral award which reads as follows:-

> **Section 34:- Application for setting aside arbitral award—**(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).
>
> (2) An arbitral award may be set aside by the Court only if—
>
> (a) the party making the application furnishes proof that –
>
> **(i)** a party was under some incapacity, or
>
> **(ii)** the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or
>
> **(iii)** the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
>
> **(iv)** the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:
>
> Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or
>
> **(v)** the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or
>
> b. the Court finds that—
>
> **(i)** the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or
>
> **(ii)** the arbitral award is in conflict with the public policy of India.
>
> *Explanation.*—Without prejudice to the generality o sub-clause (ii), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under Sectioni 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the application was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award."

18. From the reading of the above provisions, it is clear that non-giving of notice as required under Section 12 of the Act, 1996 is not a ground for setting aside the award. Under what circumstances, the Court can set aside the arbitrary award under Section 34 (2) of Act, 1996 has been decided by the Apex Court in a decision reported in ***OIL AND NATURAL GAS CORPN. LTD. V. SAW PIPES LTD.,*** it was held that:

" In the result, it is held that:--

A. (1) The Court can set aside the arbitral award under Section 34 (2) of the Act if the party making the application furnishes proof that—

i. a party was under some incapacity; or

ii. the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

iii. the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

iv. the arbitral award deals with a dispute not contemplated by orl not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration;

(2) The Court may set aside the award:--

i. (a) if the composition of the arbitral tribunal was not in accordance with the agreement of the parties;

(b) failing such agreement, the composition of the arbitral tribunal was not in accordance with Part I of the Act:

ii. if the arbitral procedure was not in accordance with :--

(a) the agreement of the parties; or

(b) failing such agreement, the arbitral procedure was not in accordance with Part I of the Act.

However, exception for setting aside the award on the ground of composition of arbitral tribunal or illegality of arbitral procedure is that the agreement should not be in conflict with the provisions of Part I of the Act from which parties cannot derogate.

(c)If the award passed by the arbitral tribunal is in contravention of provisions of the Act or any other substantive law governing the parties or is against the terms of the contract.

(3) The award could be set aside if it is against the public policy of India, that is to say, if it is contrary to:--

(a) fundamental policy of Indian law;

b. the interest of India; or

c. justice or morality; or

d. if it is patently illegal.

(4) It could be challenged:--

(a) as provided under Section 13(5); and

b. Section 16(6) of the Act.

B . (1) The impugned award requires to be set aside mainly on the grounds:--

i. there is specific stipulation in the agreement that the time and date of delivery of the goods was the essence of the contract;

(ii) in case of failure to deliver the goods within the period fixed for such delivery in the schedule, ONGC was entitled to recover from the contractor liquidated damages as agreed;

(iii) it was also explicitly understood that the agreed liquidated damages were genuine pre-estimate of damages;

(iv) on the request of the respondent to extend the time limit for supply of

goods, ONGC informed specifically that time was extended but stipulated liquidated damages as agreed would be recovered;

(v) liquidated damages for delay in supply of goods were to be recovered by paying authorities from the bills fro payment of cost of material supplied by the contractor;

(vi) there is nothing on record to suggest that stipulation for recovering liquidated damages was by way of penalty or that the said sum was in any way unreasonable;

(vii) in certain contracts, it is impossible to assess the damages or prove the same. Such situation is taken care by Sections 73 and 74 of the Contract Act and in the present case by specific terms of the contract."

19. From the above decision, it is clear that as to under what circumstances, the award passed by the arbitrator can be set aside. None of the conditions laid down in the above decision are brought to the notice of this Court so as to interfere with.

20. On the other hand, the ground on which the petitioner seeks to set aside the award is only for non-issuance of notice as required under Section 12 of the Act. As a matter of fact, the petitioner himself solicited for appointment of an arbitrator and arbitrator has given an adequate opportunity to the petitioner to represent his case. In such view of the matter, non-issuance of notice as required under Section 12 of the Act, 1996 by itself cannot be a sole ground to set aside the same. No other illegality or infirmity has been pointed out by the learned counsel for the petitioner that the award of the arbitrator is erroneous on the proposition of law or that the arbitrator had proceeded illegally or an error of law is apparent on the face of the award so as to call for interference by this Court.

21. Therefore, the writ petition is devoid of merit. In the absence of bringing the case for setting aside the award within the four corners of Section 34 of the Act, 1996, this Court is of the opinion that the writ petition is not maintainable.

22. Accordingly, the writ petition is dismissed at the stage of admission.

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February 9, 2005

KVR

To

1 The Chairman and Managing Director,

Hindustan Petroleum Corporation Ltd,
Registered Office, 17,

Jamshedji Tata Road, Mumbai - 400 020.

2 The Senior Regional Manager-Retail, Hindustan Petroleum Corporation Ltd,
Vijayawada Retail Regional Office, Kattubadipalem, Pinapaka Post, G. Koduru Mandalam,
Kondapalli - 521 228, Krishna District.

3 The Secretary, Union of India,
Ministrhy of Petroleum & Natural Gas, 201,

'A' Wing, Sastry Bhawan,
New Delhi - 110 001.

4 Two C.D. Copies.